STATE OF NEW YORK

PUBLIC EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF THE ARBITRATION BETWEEN:

NYS Law Enforcement Officers Union,
Council 82, AFSCME L. 975
Union,

and

Rensselaer County, and Rensselaer
County Sheriff's Office, Employer

Grievant: John Gorman

OPINION AND AWARD

Case no. A2013-2011

Before: PAUL S. ZONDERMAN, ARBITRATOR

Appearances:

Union:
Matthew P. Ryan, Esq.
Council 82, AFSCME
63 Colvin Avenue
Albany, New York 12206-1111

Employer:
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Dates of Hearing: January 31, 2014

PROCEDURAL BACKGROUND

In accordance with contract Article 26, General Municipal Law §207-c[1] Procedure, and §6 thereof, Appeal of Adverse Final Determinations, the parties met at the Rensselaer County Offices in Troy, NY, on Jan. 31, 2014, to consider the denial of 207-c benefits to the Grievant and to determine:

> What is the scope of the Arbitrator's review; and whether the determination regarding Officer John Gorman's General Municipal Law §207-c benefits was supported by a preponderance of the evidence. If not, what shall the remedy be?

There was no objection raised to the request for arbitration, or the reference to this Arbitrator for hearing, and I conclude that the matter was properly before me for a determination. The issues and facts of the case were discussed at length by the parties and the Arbitrator since an initial issue arose as to whether the Arbitrator should base his decision on 'preponderance of the evidence' solely upon the record below, and the decision of Undersheriff Patrick A. Russo (introduced as Joint Exhibit 3), or should the Arbitrator hear additional witnesses and evidence on additional days and make his determination based on all that would be presented to him. The Union wished to expand the evidence before the Arbitrator to that which was available to, but not collected or utilized by Undersheriff Russo at the time. The Employer wished to limit the Arbitrator to the evidence in the record below, which was actually utilized by Russo as the basis for the decision to be reviewed. The answer to this question principally revolves around the interpretation of contract Article 26. That preliminary question must be determined prior to going forward with additional evidence.

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[1] Excerpt from NYS General Municipal Law § 207-c. "Payment of salary, wages, medical and hospital expenses of policemen with injuries or illness incurred in the performance of duties. * 1. Any ... corrections officer of the sheriff's department of any county (hereinafter referred to as a "policeman") ... who is injured in the performance of his duties or who is taken sick as a result of the performance of his duties so as to necessitate medical or other lawful remedial treatment shall be paid by the municipality by which he is employed the full amount of his regular salary or wages until his disability arising therefrom has ceased, and, in addition such municipality shall be liable for all medical treatment and hospital care necessitated by reason of such injury or illness. ...".

The Union brought two witnesses who did not participate in the initial investigation by Patrick Russo[2]. Since the two witnesses present were non-employees, it was agreed that they be allowed to testify and be cross-examined, but with the understanding that such evidence would be totally disregarded if the determination of the preliminary issue was to limit to the evidence to the record below.

A transcript of the proceedings was taken by Deborah McByrne of MF Reporting, Clifton Park. At the end of the evidentiary hearing, the parties were given until February 14, 2014, to email or postmark their briefs to the Arbitrator. Briefs having been received by February 18, 2014, the hearing was closed.

CONTRACTUAL PROVISIONS

26.4 Benefit Determinations. An application for the benefits of Section 207-c of the General Municipal Law shall be processed in the following manner:

26.4a **An individual seeking benefits under Section 207-c must prove by substantial evidence his/her entitlement to them.** The Sheriff or the **Sheriff's designee, shall promptly review an application timely made and any other pertinent information, documents or evidence available. In reaching his/her determination** in each case, the Sheriff or the **Sheriff's designee, may consider relevant arbitral and/or judicial decisions as well as any other information which may be available.** Should he determine that the corrections officer was injured in the performance of duty or that the corrections officer was taken sick as a result of the performance of duty so as to necessitate medical or other lawful treatment, the Sheriff or the Sheriff's designee, shall, pursuant to Section 207-c, direct payment of the full amount of the regular salary or wages until the disability arising therefrom has ceased and shall insure that the County, through the health insurance provided to the corrections officer, will be responsible for the cost of medical care associated with such injury or illness. (It is understood that any amounts not otherwise covered by the health insurance carrier will be paid or reimbursed, as necessary, by the County.) **A written notice of such determination** by the Sheriff, or **the Sheriff's designee, shall be provided to the corrections officer** and placed in the correction officer's personnel file. (emphasis added throughout)

26.4b The payment of full salary or wages may be discontinued as expressly provided by Section 207-c. A review of eligibility for the continuation of benefits may occur after an assessment of the medical condition of a corrections officer or other information raises a question as to whether a disability may have ceased or whether the extent of a disability may have diminished so as to permit a light duty assignment, as the case may be.

26.4c **In the event a question arises as to either initial eligibility for benefits** or the continuation of benefits once awarded, the following procedure shall apply:

(i) The Sheriff or the **Sheriff's designee, shall promptly inquire into the fact(s)** surrounding the matter at issue. A corrections officer may be required to submit to one or more medical examinations as may be necessary to determine the existence of a disability or illness and its extent. To resolve a question of initial or continued eligibility for benefit, the Sheriff, or the Sheriff's designee, shall make a decision on the basis of medical evaluations and other information as may be available and/or as may be provided by the corrections officer.

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[2] Ruth Vibert, former Chief of Corrections, who had overseen the running of the Correctional Facility; and psychologist Dr. James Thalmann, who had evaluated Grievant on September 30, 2013.

The burden of proving eligibility for 207-c benefits shall be upon the corrections officer applying for same.

The applicant must prove by substantial evidence his/her entitlement to benefits. A corrections officer or his/her representative may produce any document, sworn statement or other record relating to the alleged injury or sickness or the incident alleged to have caused such. The Sheriff or the Sheriff's designee shall have the authority to employ medical specialists and other appropriate individuals, may at reasonable time and at reasonable notice require the attendance of the corrections officer or any witness to an incident to secure information; may require the corrections officer to sign a release or waiver for information of his/her medical history; and may undertake any other reasonable act necessary for making a determination pursuant to this procedure (including, but not limited to, requiring the corrections officer to submit a detailed sworn statement or the circumstances surrounding his/her alleged injury or sickness.

All medical examinations directed by the Sheriff, or the designee pursuant to this section shall be at the expense of the Employers.

26.6 Appeal of Adverse Final Determinations.

26.6a In the event that a corrections officer disagrees with any final determination regarding a proposed light duty assignment or the initial or continued eligibility for benefits, the corrections officer, within ten (10) calendar days of the receipt of the determination, shall present to the Sheriff or the Sheriff's designee, a written demand for arbitration. Compliance with the steps and timeframes specified in this procedure shall be a condition precedent to arbitration.

26.6b A hearing shall be held within thirty (30) calendar days from the date of the request. The Arbitrator shall be selected from a list provided by the New York State Public Employment Relations Board (PERB).

26.6c The Arbitrator will be bound by the determination of the Sheriff unless he/she finds that the Sheriff's determination is not supported by a preponderance of the evidence. It is the parties intention that the Arbitrator is not to review the Sheriff's determination *de novo* or substitute his/her judgment for that of the Sheriff's. The parties intent is that the Sheriff's determination is to be sustained unless the Arbitrator finds that the Sheriff's determination is not supported by a preponderance of the evidence. It is further the intention of the parties that each case is to be reviewed individually by the Arbitrator and that the Sheriff's utilization of relevant arbitral and/or judicial decisions in reaching his determination in each case is appropriate. The decision of the Arbitrator shall be final and binding. The Arbitrators fee shall be shared equally by and between the parties.

26.6d A determination made by any officer, agency, board or court regarding the existence of a disability or its intent or regarding an entitlement to any other statutory benefit because of a corrections officer's disability, may be noticed by, but shall not be controlling upon the Arbitrator. The parties acknowledge and agree that the criteria for benefits under Section 207-c is different from criteria for qualification for other statutory benefit systems.

ARGUMENTS OF THE PARTIES

The Union argues that nothing in the agreement prevents the introduction of evidence not considered by the Sheriff in making the initial determination; that the parties' agreement provides that the Sheriff must review available evidence when making a determination; that Article 26.6c states that the determination must be upheld "unless the Arbitrator finds that the Sheriff's determination is not supported by a preponderance of the evidence"; that this provision has no limitation on the scope of evidence that the Arbitrator can consider; that preponderance of the evidence refers to all the evidence available and relevant to the claim; that Article 26.4a states that "the Sheriff...shall...review...any other pertinent information, documents or evidence available"; that Article 26.6c lacks any limitation on the evidence; that all evidence available must be considered; that available evidence must be considered whether or not it was considered by the Sheriff; that if the County considered evidence not submitted by Claimant, why should Claimant be foreclosed from relying on other evidence available; that if the Sheriff must consider all available evidence, it follows that all available evidence should be considered on appeal; that at the very least, a hearing is required to determine what evidence was available when the Sheriff made the determination; that it would be fundamentally unfair for the County to pick and choose the evidence it would review on an initial application; that the contractual appeal procedure replaces an Article 78 court proceeding; that Article 78 remains to guide the parties at arbitration; that the Arbitrator steps into the shoes of the Court and should conduct the matter similarly to an Article 78 review; that "this is what the parties agreed to do hence the reference to the review not being 'de novo', which is the standard applied in Article 78 proceedings"; that PERB has held that the employer need not negotiate away the Art. 78 review procedure; that where there is no agreement to abandon Art. 78 procedure, the de novo procedure of Art. 78 applies; that such procedure allows evidence taking where a fact issue exists and when the determination was made without a trial; that the parties have agreed to retain the Art. 78 procedure insofar as there exists an issue of fact; that the issue of fact is whether Claimant's psychological injuries were sustained in the performance of his duties; that in a prior arbitration between the parties (Cohen), Arbitrator Trela held that the hearing is designed for the claimant to appear and give all relevant evidence; that since the Trela case had no hearing and there was an issue of fact, the parties were allowed to present available evidence; that other jurisdictions under extremely similar procedures, allow outside evidence in making the appeal determination; that Saratoga County has an identical procedure to Rensselaer's and admits evidence outside the record (Arbitrator Jay Siegel in the *Buda Case)*; that Oneida County has similar language that the review is not de novo and yet allows evidence outside the record (Arbitrator Steven Smith in the *Copperwheat Case*); that the Union's construction of the contract should prevail; that the County's attempt to thwart relevant evidence is inconsistent with the contract, and inconsistent with Article 78, and inconsistent with other jurisdictions; that Arbitrator John Trela, in a 2011 arbitration between the same parties (Miranda Cohn Case), took testimony and documentary evidence in denying the claim; that the Trela case stands for the proposition that the hearing is designed for the Claimant to appear and give evidence; that in the present case there is a factual issue (causation); that the Saratoga

County §207-c Review Procedure (Exhibit A to brief) is identical to that of Rensselaer County; that in a recent case (Exhibit B to brief, Arbitrator Jay Siegel, *Richard Buda case*), the Arbitrator took evidence outside the initial determination; that Oneida County's 207-c procedure (Exhibit C to brief), is similar to that of Rensselaer, and the review is not de novo; that evidence outside the record has been admissible on appeal (Exhibit D to brief, Arbitrator Steven Smith, *Kelly Copperwheate case)*; that the last question is what has the County to hide; that it should relish the opportunity to support its determination; and that this proceeding is in the nature of an Article 78 hearing and proof should be any relevant evidence.

The Employer argues that Article XXVI contains the collectively bargained GML 207-a Procedures; that these procedures clearly articulate that the Arbitrator is bound by the Sheriff's determination if supported by a preponderance of the evidence; and that the Arbitrator is not to conduct a *de novo* review of the Sheriff's determination; that the Arbitrator's review is limited to the record below; that the introduction of new evidence never presented to the Undersheriff would violate contract §26.6c; that contract §26.4 states that the corrections officer seeking 207-c benefits has the burden of proving his entitlement by substantial evidence; that Joint Exhibit 3 contains all the evidence submitted by Claimant as well as Dr. McIntyre's evaluation obtained by the Employer; that Claimant's application filed on July 18, 2013, provided additional documentation including letters from his psychologist (Dr. Thalmann); that Claimant had the opportunity to provide Undersheriff Russo any other evidence he wanted to be considered; that the 2011 decision of Arbitrator John Trela (Cohn Case) between the parties, cited by the Union, is distinguishable since it related to termination of benefits for failure to work a light duty assignment and testimony was necessary to determine whether there was such a failure; that the Trela decision nevertheless was clear regarding the scope of review; that the Employer took the additional step of obtaining an independent medical examination; that Claimant had the burden of proof to support his claim; that Undersheriff Russo decides the matter based upon information before him; that if new information not provided during the application process is allowed before the Arbitrator, the Arbitrator would be engaging in a *de novo* review prohibited by §26.6c; that the Undersheriff's determination is supported by a preponderance of the evidence; that the Arbitrator's role is to review the record below and determine if the Undersheriff's decision was supported by a preponderance of evidence; that any other procedure would negate the clear intent of the parties' agreement; that the Undersheriff's determination should be sustained; and that no additional evidence or testimony be permitted.

DISCUSSION - SCOPE OF REVIEW

There are many permissive 207-c actions that the Sheriff is enabled to do, in his discretion[3]; but he is not required to do these things. If the Sheriff was required to

[3] The Sheriff "shall make a decision on the basis of medical evaluations and other information as may be available and/or as may be provided by the corrections officer" (26.4c(i)).

actively "collect available evidence", then he would be the one with the burden of proof, and not the Complainant. But the person seeking benefits is the one to submit an application and evidence which constitutes "substantial evidence" in support their position. The Sheriff's designee "shall promptly review an application timely made and any other pertinent information, documents, or evidence available" (§26.4a). The Union argues that consideration of all "evidence available" (26.4a) supports the conclusion that "available" means whether or not it was considered by the Sheriff's designee in making his determination. That is a huge leap, not supported by such general contract language. This was not the intent of the parties. Information gathering by the Sheriff is at his discretion. Article 26.4c gives the Sheriff the option to investigate beyond what may be provided by the corrections officer seeking benefits. Note the use of the word "or" in the following quote in Article 26.4c(i):

> "To resolve a question of initial or continued eligibility for benefits, the Sheriff, or the Sheriff's designee, shall make a decision on the basis of medical evaluations and other information as may be available and/or as may be provided by the corrections officer".

In Joint Exhibit #1, the contract, on page 48, the words "**or as**" are actually in bold type, and this was not supplied, as emphasis, by the Arbitrator. The "or" made it optional for the Sheriff to investigate all available evidence; and the burden of proof language made submission of evidence the responsibility of the corrections officer. The parties made it clear, by what immediately follows: "The burden of proving eligibility for 207-c benefits shall be upon the corrections officer applying for same".

The parties took great pains to distinguish between the evidence submitted by the corrections officer and other evidence which may have been "available" to either party. In §26.6c the parties to the contract recited, in specific terms, their intent.

> "26.6c The Arbitrator will be bound by the determination of the Sheriff unless he/she finds that the Sheriff's determination is not supported by a preponderance of evidence. It is the parties' intention that the Arbitrator is not to review the Sheriff's determination *de novo* or substitute his/her judgment for that of the Sheriff's. The parties intent is that the Sheriff's determination is to be sustained unless the Arbitrator finds that the Sheriff's determination is not supported by a preponderance. . . ." (underlining added)

This term, *de novo*, has a very specific meaning for advocates and fact-finders. The Miriam-Webster Dictionary defines *de novo* as: "over again, anew, afresh, another time" and gives an example as: "since a mistrial was declared, the case will have to be tried de novo". In the field of arbitration, the meaning is the same - - If the Arbitrator were to conduct a trial *de novo* in this matter, it would be heard as if it were a new case, and a decision would be based on what was currently known and presented to the Arbitrator. (i.e., In contrast, in a disciplinary arbitration, the Arbitrator determines guilt and penalty, and is not limited to whatever evidence the employer used to make its original decision.)

In the present case, the parties intended to give principal authority to the Sheriff to investigate and make a determination as he saw fit. This was not to be a new trial. The Sheriff was bound to base his decision on substantial evidence; and the Arbitrator was bound by the Sheriff's determination if it was supported by a preponderance of the evidence. The contract says the review is not to be a trial *de novo*. That is a specific and unambiguous intent, stated in the contract, and it trumps any general language elsewhere. If additional evidence and testimony were introduced at a subsequent review, then one could not evaluate the Sheriff's decision on the merits - - it would be the Arbitrator making the decision on a different playing field, perhaps months later. In effect, it would be the Arbitrator substituting his judgment for that of the Sheriff - - - something which is the reverse of the parties intent recited above.

The Union argues that Saratoga County has an identical 207-c Review procedure and they allow evidence outside the record to decide if a benefits determination should be overturned. Exhibit B in their brief is the 2012 *Richard Buda Case*, where Arbitrator Jay Siegel held a full hearing and the grievance was sustained. The *Buda Case* however did not begin with a stipulated issue which required the preliminary determination of the "scope of the Arbitrator's review". Furthermore, the Saratoga contract, Exhibit A to the Union's brief, Article 24.6 (Appeal of Final Adverse Determinations), is not identical to the Rensselaer County contract. The Saratoga County contract (Art. 24.6, page 33) does not contain the following expression of specific intent which is found in the Rensselaer County contract 26.6c (J-1, at page 50):

> "It is the parties intention that the Arbitrator is not to review the Sheriff's determination *de novo* or substitute his/her judgment for that of the Sheriff's."

The Saratoga County contract also fails to include the line "The burden of proving eligibility for 207-c benefits shall be upon the corrections officer applying for same"[4]. These are fatal distinctions between the Saratoga case and the present case. The Union is thus forced to argue that the burden of proof and the anti-de novo provisions of the contract are "inconsequential to the evidentiary decision". I disagree. With the burden of proof clearly being on the Claimant, the Sheriff has no obligation to conduct an investigation which gathers all relevant evidence available. The Sheriff merely has the permissive ("may") authority to seek its own information, including a medical examination of Claimant. The Sheriff's failure to do so may be at his own risk if the Claimant submits substantial evidence. To put a mandatory investigative burden on the Sheriff would be to follow the ambiguous general contract language and ignore the specific contract language, contrary to the parties recited intent.

The Union cites an Oneida County case where the procedures are 'similar' and the review is not *de novo*, but the parties could present evidence outside the record. That was the 2012 *Kelly Copperwheat Case* by Arbitrator Steven Smith. Oneida County has specific 207-c procedures which specifically allow submission directly to an administrative hearing for any dispute arising out of the application of the procedure, (including denial, discontinuance, performance). There was no issue as to the scope of review. That 207-c Dispute Resolution Procedure also provides that the County has the burden of proof, and that all costs including the Hearing Officer fee will be paid by the County. There is no doubt that the procedures of Rensselaer County and Oneida County are at opposite ends of the spectrum where management rights are concerned. Such cases are clearly distinguishable. The fact is that there appears to be little uniformity of 207-c practices amongst the Counties cited. That makes it all the more important for the Arbitrator to study and follow the particular County's procedure, since it represents a binding mutual agreement between the parties.

The Union in the present case argues that a hearing is at least required to determine what evidence was 'available' when the Sheriff made the determination. The contract however, doesn't create this obligation. The Arbitrator is not asked to evaluate the depth

[4] Perhaps that is why the Union argued that Saratoga County had the burden of proof, and the Arbitrator held that "the PBA has the burden of proof in this case".

and extent of the Sheriff's investigation, particularly since it is the Claimant's burden of proof. We are not applying Daugherty's Disciplinary Rules to Undersheriff Russo's investigation. He doesn't have to make the 'right' decision, if that were possible to know in these cases - - he only requires a reasonable basis for the decision he makes, based upon the evidence presented to him by the Claimant and any other evidence he may choose to collect.

Many cases submitted by the parties have been reviewed, but only one case was between these same parties. That was the 2011 arbitration decision by Arbitrator John Trela in the *Miranda Cohn Case*. Although that case held that the Sheriff's discontinuation of benefits was affirmed by the Arbitrator, who had allowed additional evidence, the case was clearly distinguishable since it was principally a benefit discontinuation case covered by Article 26.5. The Claimant failed to report for light duty; and the contract §26.5a provides "If the corrections officer fails to perform the designated light duty assignment, his/her Section 207-c benefit shall be discontinued. Benefits stop automatically. There was "No hearing conducted to determine the Claimant's continuing ability to perform light duty". It was automatic. Further, the stipulated issue in that case did not raise the issue of the scope of the Arbitrator's review.

The Union argues that the *Trela Award* stands for the proposition that an arbitration is for the purpose of "the Claimant to appear and give all relevant evidence that the Sheriff's determination should be overturned". I disagree. In fact, in the opening paragraph of the "Discussion" (p. 15), Arbitrator Trela emphasizes the need to follow the contract:

> "Arbitrators are obligated to sustain or deny grievances, based on the words of the contracts that the parties themselves have constructed and reduced to writing. Arbitrators are also required to render awards within the confines of the authority granted to them by the words of the parties collectively negotiated agreements. It is generally understood that Arbitrators may not add to, take from, or modify the express words of the contract".

Why would Trela say this if it wasn't for the fact that he found a way around the *de novo/burden of proof* wording in the unusual 26.5a case where a Claimant fails to show up for a light duty assignment. I also note that Trela affirmed the denial of benefits in that case.

If the parties intended a new trial on the issue, a *de novo* hearing, they could easily change the contract language. It's not a question of fairness or justice as the Union asserts. That approach might be appropriate with a disciplinary arbitration applying the "just cause" concept. But this is a contract interpretation case, and the contract cannot be easily set aside.

The Union argues that the contractual appeal procedure replaces an Article 78 Court proceeding, and unless the parties specifically agreed to abandon Article 78's evidentiary rules, Article 78 remains a procedural guide. It argues that under Article 78, a party may be allowed to present evidence to challenge the determination, even evidence not considered in making the determination 1) where there is an issue of fact; 2) and when the decision was made without a trial type hearing prior to a determination. I don't agree with the reference to Article 78. In fact, the Trela decision did not mention, even a single time, the words "Article 78" as the basis for taking evidence, and there appeared to be no objection to the taking of evidence in that case. The Trela decision is thus distinguishable on several grounds.

There is a tangle of Court and PERB decisions in the area of GML §207-c (police) and §207-a (firefighters) benefits. It appears from these cases[5] that the Court of Appeals has held that the §207-a and §207-c appeals procedures are the subject of mandatory bargaining. I am of the opinion that he contractual wording in §26.6c and §26.4c is the product of that bargaining, and an Arbitrator is the person designated to interpret such language. The only question then is one of due process, and that is for another forum[6].

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[5] *City of Watertown* v. NYS PERB, 95 NYS2d 73, (1976-77); Poughkeepsie Firefighters Assn. v. NYS PERB, 36 PERB §7016 (2003).

[6] Complainant has not lost his job. Any time he is able to return to duty, he can get a full hearing under the Sheeran Case: *Thomas Sheeran, Michelle Birnbaum v. DOT and DOL*; 18 NY3d 61, 935 NYS2d 281; (2011) in the CSL §72 forum; or he has statutory remedies under the Workers Compensation Law, which is far more generous in defining work related causation. *Binghamton Psych Center*, 1995 WL 29241 (1995); *Hudson Valley Labs*, 1995 WL 218559 (1995); *Delta Airlines*, 1995 WL 355712 (1995).

Based upon all of the above, I find that the scope of the Arbitrator's review in this case is limited to the record below (J-3), and that no further evidence will be taken by the Arbitrator.

Whether the determination (by Undersheriff Patrick Russo) regarding Officer John Gorman's General Municipal Law §207-c benefits was supported by a preponderance of the evidence.

I. Gorman Facts taken from the Record (Exhibit J-3):

St. Peter's Hospital, admit on July 15, 2013, and discharge to home on July 17, 2013; completed stress test (Dual Isotope STR/RST SPECT GAT), and passed in 85th percentile of age predicted maximum.
Hosp. Final Report "no reversible perfusion abnormality to suggest ischemia". "No acute cardiopulmonary abnormality."
Physician, noted in Gorman's history: "Does say that he has been having stress at work over the past two months".

Due to chest pains and elevated blood pressure, on July 15, 2013, Officer John Gorman filed a claim for benefits pursuant to GML §207-c. Undersheriff Patrick Russo was designated by the Sheriff to make the determination in this matter.

•Russo interviewed Gorman, who provided the following documentation, including historical or clinical medical notes extracted from the voluminous paperwork generated by the Hospital upon an emergency admission. Selected allegations of Gorman are extracted from the medical history.

•The Application for Benefits form (Exhibit A to J-3) recited: "7-15-13. Officer went to primary care physician due to chest pains and elevated blood pressure due to work related stress, related to retaliation from workplace violence complaint and was sent to St. Peter's Hospital by ambulance.... He was seen by Dr. Alan Fogel. Gorman was treated in the emergency room and remained over night. Employer was advised verbally on 7-15-13. This was not a recurrence of a previous injury or illness."

On 7-16-13, John Gorman filed an "Employee Injury/Illness Due Process Review Application.
Date of incident, Monday 7-15-13.
"Due to work related stress, the officer went to his primary care physician with chest pains and was taken to hospital by ambulance." The incident occurred at 4000 Main Street, Troy, NY 12180. "Illness" ...Sustained due to work related stress – officer has experienced stress due to ongoing workplace violence complaint – officer has received retaliation at work – including threats, retaliatory work assignments, ostracism, etc."

7-19-13. Letter from Dr. Alan Fogel, Albany:"John Gorman is currently under my medical care and may not return to work at this time. Please excuse John for 6 day(s). He may return to work after his follow-up appointment on 7/24/13. Activity is restricted as follows: none. If you require additional information please contact our office. (Document generated by: Teresa Giminiani 7/19/13 10:36 AM"

St. Peter's Hospital Discharge Instructions "Your Discharge Plan Is: Home with no services needed. Medication instructions given to patient. 7-17-13."

Rensselaer County Correctional Facility – Incident Report.
Signed written narrative by John Gorman: "On July 15, 2013 at approximately 1045, I Officer Gorman, John badge number 3019, went to my primary care physician Alan Fogel, with chest pains and elevated blood pressure due to work related stress. I have experienced stress due to an ongoing workplace violence complaint. I have experienced retaliation at work including threats, retaliatory work assignments, being ostracized etc. Dr. Fogel, after an examination, called for an ambulance to transport me to St. Peter's Hospital Emergency Room for immediate for immediate cardiac and psychological care".

(Exhibit B to J-3)
A letter from James P. Thalmann, PhD dated August 21, 2013, was faxed on August 22, 2013 to Undersheriff Russo The letter recited: "Mr. Gorman continues in therapy diagnostic formulation of acute stress disorder. (DSM IV TR 308.3) and panic disorder (300.01)."

A letter from James P. Thalmann, PhD dated August 19, 2013, was faxed on August 19, 2013 to Undersheriff Russo. The letter recited: "John Gorman, age 43, was seen for psychological testing and psychotherapy. He currently has significant distress, depression, anxiety symptoms such that he needs continued sick leave from work."

A letter from James P. Thalmann, PhD dated August 1, 2013, was faxed on August 1, 2013 to Undersheriff Russo. The letter recited: "John Gorman, age 43, was seen for a psychological evaluation on July 30, 2013. In addition to the consultation, psychological testing was administered. It is understood that Mr. Gorman has worked for the Rensselaer County Sheriff's Department for the past six years as a correction officer. He relates work stress issues resulting in anxiety and depression. He has been out of work from July 15, 2013, at which time he notes he was briefly admitted to St. Peter's Hospital. At this time, due to level of ongoing stress it is recommended that he continue to remain on sick leave beyond his anticipated return to work date of August 3, 2013. It is undetermined as to his return to work date."

Assessment Report, Dr. Andrei Nazdryn, St. Peter's Healthcare, 7-15-13.
Relevant items noted: "Are you worried about your safety at home/ No; Is there any one hitting, hurting, or causing you to feel unsafe/ No; Do you feel you are being taken advantage of by anyone/ No; Problems with sleep/Insomnia.

Charted Interventions Report. Dr. Andrei Nazdryn, St. Peter's Healthcare, 7/15-13. Depression consult, follow-up with Deborah Schonitzer, PhD; Chest pain consult, follow-up with Dr. Jeffrey Uzzilia.
Clinical Notes report, Dr. Andrei Nazdryn, St. Peter's Healthcare, 7/15-16/13. "Patient has no complaints of chest pain at this time. Patient will be monitored".

Officer Gorman also gave Undersheriff Russo a Complaint he filed on July 6, 2013 alleging workplace violence (closing door incident).
• July 6, 2013, County Incident Report, describes incident of same date, approx. 1210: location of incident: watch commander office. Physical force was not used. Page 2 was a statement signed by **Officer Gorman.**

> "On July 6, 2013 at approximately 1210 while assigned to Relief Three for B-Line shift (0730-1530), I Officer Gorman, John 3095 was ordered to reboot the Kronos Server by Sgt. Dunham. I was relieved from my post on North 2 by Officer Ragosta per Sergeant Connell. While completing the assigned duty I went into the Watch Commanders Office where Sergeant Connell, Sergeant Walraed, Sergeant Sauer, Officer Hoffman and Sergeant Maselli

were. Seregant Maselli was standing at the door holding it open. I requested Sergeant Connell to restart the computer in the office. I stood in the office but not clear of the door because Sergeant Maselli was holding it open. After approximately three minutes Sergeant Maselli walked past me and a second later the office door hit me in the back of the head, left shoulder and upper back. I turned around to move the door from my back, and said out loud "really" because I was shocked I was just hit by the door from behind. There was no reaction from Sergeant Maselli. As I turned and saw Sergeant Walraed start to get up from his chair to get the door while at the same time saying, 'the door'. I secured the door using the chain installed on the wall by maintenance e to keep the office door open. I was unsure of what to say at the time. None of the four Sergeants said anything to me about what just took place. When the Watch Commanders computer was rebooted and Kronos was working I returned to my assigned duties. While doing a break on North 3 the back of my head and neck started to hurt more. In fear of relation and because no Sergeant addressed the issue at the time the event took place I'm completing this incident report and summitting it directly to Captain Smith. I would like to file a formal complaint against Sergeant Maselli for intentionally allowing the office door to hit me. I feel his actions were deliberately negligent considering the door has a device to ensure it stays open.".

This was reviewed by Captain Smith on July 8, 2013 at 2:30 pm.

Exhibit D to J-3.
Letter excerpt from **Sgt. Donato P. Maselli** to the County Sheriff's Records Officer dated July 23, 2013, re Freedom of Information Law Request (FOIL) for Records. [Notarized and sworn to before a Notary Public on 7-24-13]

"Under the provisions of the New York Freedom of Information Law, Article 6 of the Public Officers Kaw, I hereby request a copy of all written and video documentation of the 'alleged' incident concerning Officer John Gorman being 'allegedly injured' by the watch commanders office door on July 6, 2013 during the B-line (0730-1530) shift. ...".

On July 9, 2013, **Sgt. Donato Micelli** filed a statement on the back of an Incident Report Form, as follows:

"On 7-6-13 at 1210 hours I was standing in the watch commanders office, at the door, speaking to Sgts Walraed and Connell. Moments later Office[r] Gorman approached the watch commanders office to speak to Sgt. Connell, who was sitting in the chair behind the desk. Officer Gorman was basically standing shoulder to shoulder with me. He also did not polit[e]ly say "excuse me" when he interrupted the conversation. I then moved to another part of the office because my personal space was invaded. When I moved to another part of the office the door apparently closed on officer Gorman. I did not know that the door wasn't chained opened with the chain that holds the handle. I did hear Sgt. Walraed say "door" 2 or 3 times but when I actually realized the door wasn't secured open it had already apparently struck officer Gorman. This was not malicious on my part. It was simply an accident."

A statement was also provided by **Sgt. J. Walraed** and reviewed by Captain Smith on 7-23-13.

On July 18, 2013 I, Sergeant J. Walraed 3014 was assigned to the unit one post fpr the B-Line shift (0730-1530). At approximately 0900 I was ordered by Captain H. Smith to write a report on the events of July 6, 2013 at approximately 1200 in the Watch Commanders office, regarding Officer Gorman and Sergeant Maselli. At approximately 1200 I was in the Watch Commanders office with Sergeants Connell and Maselli along with Officers Gorman and Hoffman. I was sitting on the eastern side of the office. Officer Gorman was standing in the doorway on the southern side (where the door would latch to the frame). Sergeant Maselli was standing on the northern side of the doorway (where the hinges are located). All parties mentioned were talking about a computer issue that Sergeant Dunham was attempting to resolve vicariously through Officer Gorman and Sergeant Connell via phone calls. Sergeant Maselli walked from the doorway to the south-eastern side of the office and looked at the bulletin boards, at that time I noticed the door beginning to close. I said to Officer Gorman "door", who looked at me and remained in the doorway. The door continued to close until it made contact with Officer Gorman's left shoulder. Officer Gorman didn't say anything or appear to show any change in physical demeanor, Officer Gorman exited the area. As of this date and time, Officer Gorman has not made a complaint or requested any further action into this matter to me."

A statement was also provided by **Sgt. J. Connell** and reviewed by Captain Smith on 7-15-13.

> On July 6, 2013, I Sgt. Connell, Jr. was assigned to the watch commander post. CO Gorman alleges that he was injured by the watch commander's office door when Sgt. Maselli let it swing shut. I was in the office at that time and have no recollection off this occurring. Also CO Gorman never stated to me that he was injured. I also did not receive any notice of complaint from CO Gorman on that date or any other."

A statement was also provided by **Sgt. Stacy Sauer** and reviewed by Captain Smith on 7-11-13.

> "On July 6, 2011, I Sgt. Sauer was working the b-line shift on an authorized switch. Please note that I have no recollection of any Incident occurring in the watch commanders office involving CO Gorman getting hit with a door. Furthermore, at no point did CO Gorman approach me regarding this incident, either to make an official complaint, or to report any injury.
>
> Additional Note: I was asked by Captain Smith regarding this issue, I advised Capt. Smith that I had no knowledge nor recollection of this incident. I was at that point directed by Capt. Smith to write an informational."

A statement was also provided by **Michelle Hoffman** and reviewed by Captain Smith on 7-26-13

> "On Saturday July 6, 2013-13, I Correction Officer (C/O) Michelle Hoffman was working the B line shift (0730-1530). At some point during the day, I, CO Hoffman was standing in the Watch Commander's Office. While I, CO Hoffman was standing in the Watch Commanders office I CO Hoffman saw Sergeant (Sergeant) Maselli come into the office. I saw Correction Officer John Gorman standing in the doorway. When Sgt Maselli walked through the door I CO Hoffman saw the door closing and bump CO Gorman"

A second statement was provided by **Sgt. Donato Maselli** and reviewed by Captain Smith on 7/23/13.This took place on July 19, 2013, in the west parking lot.

> "On Friday July 19, 2013 I, Donato P. Maselli was assigned as the Unit One supervisor on the C-line shift. At or close to 1715 hours I was in the west lot returning from my vehicle when I witnessed allegedly injured Officer John Gorman in a late model 4 door Honda, dark blue in color, in the southeast part of the west lot. He was the sole occupant of the vehicle. He was driving said vehicle. The vehicle stopped and the passenger door was opened with on duty officer Leonard Smith leaning into it. The vehicle remained stopped for several moments. I then witnessed officer Smith close the passenger door. He, officer Smith, then approached his vehicle which was parked in the no parking section of the west lot only several feet away

from where officer Gorman stopped his car. Officer Smith was at the passenger side of his vehicle, a small SUV, with the passenger side door opened. Officer Gorman then drove towards the southwest exit of the west lot. He, Officer Gorman, then proceeded down Main Ave. towards Burden Ave. During this I was walking back towards D228 to enter the facility. I was still in the parking lot walking towards said door. Officer Gorman then stopped on Main Ave. near Officer Smith's SUV. Officer Smith walked to said vehicle on the driver's side of it. The window then went down and Officer smith and Officer Gorman interacted once again. This second interaction only lasted a few moments. Officer Gorman then drove away down Main Ave. towards Burden Ave. At the time Officer Smith approached Officer Gorman's vehicle the second time, I arrived at D228 and opened it with my ID card. I stood at the door with it partially opened, watching Officer Smith walking back towards my position at the door. I waited for Officer Smith to arrive to my location. When Officer got to my location, I stated to him that it does not look like Officer Gorman is writhing in pain since he drove his vehicle to the facility. Officer Smith then made the comment "Looks like he's not using the neck brace I gave him". I was not sure if he was jokingly stating that or not. After making the above comment, Officer Smith quickly changed the subject. Officer Smith did have several documents in his hand that Officer Gorman gave him during their interactions. The above statement that I scribed is truthful in its entire content and to the best of my knowledge. The above can be verified by simply viewing video cameras or by taking a written report from Officer Smith. This can easily prove that Officer Gorman is NOT physically impaired to operate a motor vehicle, nor was he "assaulted" in any way by anyone."

Memo from **Captain Hal Smith** to John Gorman dated 7-31-13, Re: Formal Complaint dated 07-06-13.

> "After reviewing the reports from staff present during the alleged incident and the facility video of the watch commanders office for the above referenced date. I have found your complaint to be unfounded."

(Exhibit E to J-3)
Based upon the Gorman interview and the documentation he provided, Undersheriff Russo directed an examination of Gorman by **Dr. William McIntyre** of Public Safety Psychology. Dr. McIntyre conducted Clinical Interviews with Gorman on October 29, and December 12, 2013, and his report was received on December 26, 2013. Portions of that Report are summarized and portions are quoted. Among the medical records reviewed by Dr. McIntyre were the clinical records of Dr. James Thalmann and Dr. Henry Camperlengo.

> "Officer John Gorman was evaluated at my office at the request of the Rensselaer County Sheriff's Office to determine if he has a psychological condition and if so, are his psychological symptoms caused by his job as a Corrections Officer.
>
> Officer Gorman was informed of the nature and purpose of this evaluation. Specifically, he was told that this was an evaluation requested by the Sheriff's Office, that what we discussed was not confidential and everything we talked about would go into a report to Sheriff's Office. He indicated his understanding and agreement with this and signed a written notice of this disclosure as well. ... .
>
> **History:** Ojfficer Gorman's sister had been dating another Sergeant at the jail (AP) for 27 years. In October 2012, the sister found out that AP had been cheating on her and ended the relationship. Sergeant AP blamed Officer Gorman for the break-up, believing he had told his

sister about the affair. (Officer Gorman denies this.) AP called Officer Gorman and made a statement about "you will pay" which Officer Gorman perceived as a threat.

In the following months, Officer Gorman felt AP was scrutinizing his work, looking for mistakes that he could write him up for and he did receive one verbal warning. He felt he was being followed by the cameras in the jail and had arguments with friends of AP that had previously been his friends. He would see AP in the halls at the jail and when AP smiled at him, he took it as a threat. He felt that AP was trying to promote a verbal altercation by saying things such as "Good morning".

In February 2013, the Civil Service list for Sergeant was released and Officer Gorman did not score high enough to stay in his position of Sergeant so he returned to his permanent rank as a Corrections Officer. He perceived this demotion as retribution for filing harassment charges against AP. However, he was told that he would be promoted when there were additional openings and he was reachable. About the same time, AP called him at home and allegedly made a threat about breaking his jaw and boasting that he 'took your stripes' -- referring to the demotion. He complained to the jail Superintendent (RV) who told him that this conflict had nothing to do with work. He then filed a criminal complaint for harassment with the NYSP and also a workplace violence complaint with the County Human Resources. He stated that he was still going to work every day but was not sleeping, did not want to go out, and was shaking.

Officer Gorman's workplace violence complaint was investigated by Tom Hendry, the County Director of Human Resources and was found to be unsubstantiated. Officer Gorman reports that the workplace violence investigation has been re-opened at the direction of the NYS Department of Labor but I do not have any documents supporting this claim. He also filed a complaint with the Troy Police Department, the Unioin and with County Executive Kathy Jimino but go[t] no satisfaction from any of these efforts. He continued to believe that AP was stalking him at the jail so he got a limited Order of Protection from AP but still saw him at work on a daily basis. In June of 2013, AP was suspended from work during an investigation of his use of the DCJS database to run a criminal history on his former girlfriend's new boyfriend. Officer Gorman has not had any contact with AP since then. Despite AP's absence from the work place, Officer Gorman still felt harassed on the job but now by friends of AP. In particular, he cited an incident on July 6th in which an office door swung close[d] and struck him in the shoulder. He felt this was intentional and malicious. He feels ostracized at work and that no one is willing to help him.

In July of 201[3], he went out of work feeling depressed, shaky, and having chest pains. On July 15th, he saw his Primary Care Physician who sent him to St. Peter's Hospital where he was admitted for three days and placed on a cardiac monitor. Upon release from the hospital, he was referred to a psychologist, Dr. James Thalmann, for psychotherapy and dr. Thalmann in turn referred him to Dr. Henry Camperlengo for medication management. Since July, he has seen Dr. Thalmann on a bi-weekly basis and has been diagnosed with Acute Stress Disorder. Dr. Camperlengo has seen him several times since his intake in September and has prescribed several medications for depression and anxiety (Xanax, Prozac, Trazodone, and Wellbutrin). On 10/3/12 Dr. Camperlengo wrote in his notes 'He may be looking for a disability claim if he cannot get 'justice' in his case!'. Dr. Thalmann also administered several psychological tests which supported the diagnostic impression of anxiety and depression.

He has been out of work since July and spends his time caring for the house and kids, volunteering at church, going to doctor's appointments and fighting his 'legal battle' over this case. He stated that his symptoms have improved some but he still has good days and bad days. He would like to 'get better and go back to work' when it is 'not a hostile work environment'. He wants the Sheriff's Department to have zero tolerance for behaviors such as threats and yelling. ... .

Psychological Testing: The Personality Assessment Inventory (PAI) is a 344 item objective inventory of adult personality and psychopathology. ...His scores... show problems in the areas of anxiety and depression. ...The California Psychological Inventory (CPI) is a 435 item objective test of personality traits. ...Mr. Gorman's responses suggested he is somewhat unassertive, reserved, passive and shy compared to the law enforcement norm goup.

Clinical Impressions: Officer Gorman appears to have a genuine psychological condition that has been diagnosed as Acute Stress by Dr. Thalmann. ...He has been in treatment for several months for this condition but there does not seem to have been much progress. His complaints center on the conflict with his co-worker (AP) and all stem from the end of the relationship between AP and Officer Gorman's sister. He also complains that no one in the jail administration would accept his complaints about AP, telling him that these complaints did not have to do with the business of the department. There is no mention or complaint of any stress from the duties of his job, such as dealing with inmates or being confined all day. The results of the CPI suggest that Mr. Gorman is more reserved and unassertive than the typical officer that he works with at the jail. Thus, he may not have the resources or skills to 'push back' when someone acts in an unfriendly manner towards him. The result is that he is left feeling vulnerable and threatened, even if the behavior is minor or benign.

Officer Gorman perceives threats and harassment from minor incidents (saying hello, closing door hits his shoulder). These workplace violence complalnts have been investigated and dismissed by Human Resources, an entity outside of the Sheriff's Office. Thus, his perceptions of hostile workplace seem unfounded, especially since his antagonist (AP) has been suspended and out of work since June 2013. While there may be people in the jail that side with AP in his dispute with Officer Gorman, there is no evidence that this is a concerted, organized or focused effort.

Conclusions: **Officer Gorman's psychological distress is caused by a personality conflict with a co-worker over a situation that has nothing to do with his job duties, namely the relationship between AP and Gorman's sister.** The offending party (AP) has been suspended from work since June 2013 so Officer Gorman does not have to deal with AP in any way while at work. The harassment he has documented has been over the telephone, outside of work. An investigation into his claim of workplace violence has come back unfounded. The administration of the Sheriff's Office, the union, and the County Human Resources Department have all told him essentially this is a personal issue, not a work issue. **Therefore, it is my professional opinion, that Officer Gorman's psychological issues, although bona fide, are not related to the performance of his job duties.**

William F. McIntyre, PhD., ABPP"

By Memorandum dated January 14, 2014, Undersheriff Patrick Russo made the following determination:

"On July 15, 2013, Officer John Gorman filed a claim for benefits pursuant to GML §207-c. His application for benefits is attached as Exhibit A. I interviewed Officer John Gorman in connection with his application for benefits. In support of his application, Officer Gorman provided documentation, which is attached hereto as Exhibit B. Officer Gorman also provided me with a copy of a complaint he filed on July 6, 2013, alleging an incident of workplace violence, see attached Exhibit C. The complaint was investigated, including review of relevant video footage, and determined to be unfounded by Captain Harold Smith on July 31, 2013. See attached exhibit D. Based upon the interview/hearing and review of the documentation provided by Officer Gorman, I directed that Officer Gorman be examined by Dr. William McIntyre of Public Safety Psychology. Dr. McIntyre's Report was received on or about December 26, 2013.

The GML §207-c procedure contained in the collective bargaining agreement requires an applicant to prove his eligibility for benefits by substantial evidence. The letters from Dr. Thalmann furnished by claimant indicate that he has symptoms, but do not connect those symptoms with Officer Gorman's performance of his duties as a correction officer. Dr. Thalmann's letter of August 1, 2003 states only that John Gorman 'relates work stress issues resulting in significant anxiety and depression'. No evidence furnished by claimant demonstrates by substantial evidence that his symptoms were/are the result of the performance of his duties as a correctional officer. Dr. McIntyre's report, attached hereto as Exhibit E, clearly concludes that Officer Gorman's psychological issues are caused by a personality conflict with a coworker that has nothing to do with the performance of his job duties, namely the relationship between the co-worker, identified as AP, and Officer Gorman's sister. See Exhibit E, page 5. Dr. McIntyre interviewed Officer Gorman twice, reviewed treatment records of physicians treating Officer Gorman, and administered psychological tests in the process of arriving at his determination.

I found Dr. McIntyre's assessment to be based on a comprehensive review of the issues raised in Officer Gorman's GML 207-c application and the documents submitted in support thereof. Dr. McIntyre clearly concluded that while Officer Gorman may have psychological issues, they are not related to the performance of his duties. Based upon the foregoing, claimant's application for GML §207-b benefits is denied.

Patrick A. Russo, Undersheriff, 1-14-14"

II. CONCLUSION

The attempts by Complainant to establish fault or intent in the injury from the door closing incident were unsuccessful, and his complaint was determined to be unfounded. The same is true regarding the alleged threatening phone call received at home from his sister's long time companion. The County H.R. Office found this unfounded. Complainant's reduction in grade was satisfactorily explained in the history he gave Dr. McIntyre. He didn't rank high enough on the Civil Service exam. Any other threats were mere suppositions on his part - - 'smiling' or saying 'Good morning' as being a threat. The fact that Sgt. AP, the alleged culprit or bully, had been suspended in June for a serious offense means that AP wasn't even present in the workplace when Complainant had his anxiety attack and left work on July 15th. The evidence that the Claimant had the obligation to produce was weak, and unsubstantial. Undersheriff Russo is to be commended for directing an outside psychological evaluation. Complainant's evidence was deficient. From the History alone that Dr. McIntyre was given by Claimant, we have learned much of the background facts. As to the psychological issues, Dr. McIntyre agrees with Dr. Thalmann; but Dr. Thalmann made no conclusion that Complainant's anxiety and stress were caused by his job duties.

Dr. McIntyre's conclusion was that "Officer Gorman's psychological distress is caused by a personality conflict with a co-worker over a situation that has nothing to do with his job duties, namely the relationship between AP and Gorman's sister". I find that conclusion to be well reasoned and the doctor's Evaluation to be well written.

The above review of the record establishes a preponderance of evidence supporting the determination made by Undersheriff Patrick Russo that Complainant has not established his entitlement to 207-c benefits by substantial evidence.

AWARD

1. The taking of additional evidence in this matter would be a violation of Article 26 of the parties collective bargaining agreement. The scope of this review is limited to the record below.

2. A review of the record below establishes a preponderance of evidence supporting the determination made by Undersheriff Patrick Russo that Complainant has not proven his entitlement to 207-c benefits by substantial evidence.

3. The denial of Claimants application for 207-c benefits is thus affirmed.

Dated: February 26, 2014
Schenectady, New York

PAUL S. ZONDERMAN

AFFIRMATION

State of New York
County of Schenectady

I, PAUL S. ZONDERMAN, DO HEREBY AFFIRM UPON MY OATH AS ARBITRATOR, THAT I AM THE INDIVIDUAL DESCRIBED IN AND WHO EXECUTED THIS INSTRUMENT, WHICH IS MY AWARD.

DATED: February 26, 2014

PAUL S. ZONDERMAN